REMARKS

Double Patenting

Claim 59 stands rejected under the judicially created doctrine of obviousness-type double patenting as allegedly being unpatentable over claims 16-18 of U.S. Pat. No. 6,537,756. Applicants respectfully traverse this rejection.

Applicants submit that claim 59 of the instant application and claims 16-18 of U.S. Pat. No. 6,537,756 appeared in the same parent application Serial No. 08/721,259 (subsequently issued as U.S. Pat. No. 6,093,695), which was subject to a four-way restriction requirement. A copy of the restriction requirement issued in the parent application 08/721,259 is enclosed herewith for the Examiner's reference. *See* Exhibit A.

In that restriction requirement, claim 59 as originally filed (corresponding to claim 59 of the instant application) was considered to fall within Group IV, drawn to transgenic plants, whereas claims 29-31 as originally filed (corresponding to claims 16-18 of the issued patent 6,537,756, respectively) within Group II, drawn to CryET29 genes, vectors, host cells and expression thereof.

In addition, claim 59 of the instant application and claims 16-18 of the issued patent 6,537,756 have not been changed in material respects from claim 59 and claims 29-31 as originally filed in the parent application 08/721,259, respectively, which were subject to the restriction requirement. That is, the alleged conflicting claims have consonance at the time of the present double patenting rejection and the line of demarcation between the independent and distinct inventions that prompted the restriction requirement was maintained.

35 U.S.C. §121 allows an applicant to file a divisional application if the examiner determines that there are two patentably distinct inventions in one application. If the other invention is made the subject of a divisional application which complies with the requirements of 35 U.S.C. §120 it shall be entitled to the benefit of the filing date of the original application. Moreover, 35 U.S.C. §121 states:

> "A patent issuing on an application with respect to which a requirement for restriction under this section has been made, or on an application filed as a result of such a requirement, shall not be used as a reference either in the Patent and Trademark Office or in the courts against a divisional application or against the original application or any patent issued on either of them, if the divisional application is filed before the issuance of the patent on the other application."

In the instant case, the patent 6,537,756, which has issued from an application (Serial No. 09/611,216) filed as a result of a restriction requirement with respect to the parent application Serial No. 08/721,259, should have been prohibited from being used as a reference against the present application, which is a divisional application timely filed and entitled to the benefit of the filing date of the parent application. *See* MPEP 804.01.

In view of the above remarks, Applicants assert that the present obviousness-type double patenting rejection is improper and should be withdrawn.

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This document is filed timely. No fee is believed to be due; however, should any fees under 37 C.F.R. §§ 1.16 to 1.21 be deemed necessary for any reason relating to this document, the Commissioner is authorized to deduct said fees from Howrey LLP Deposit Account No. 08-3038/11792.0017.DVUS03.

Respectfully submitted,

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